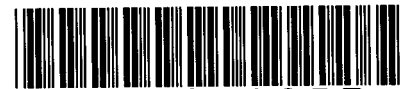


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IN THE MATTER OF THE FORMAL  
COMPLAINT OF PAC-WEST TELECOMM  
SEEKING ENFORCEMENT OF THE  
INTERCONNECTION AGREEMENT  
BETWEEN PAC-WEST TELECOMM AND  
QWEST CORPORATION

DOCKET NOS. T-01051B-05-0495  
T-03693A-05-0495

**QWEST CORPORATION'S  
COMMENTS IN RESPONSE TO  
LEVEL 3'S COMMENTS  
REGARDING GLOBAL NAPS**

Qwest Corporation ("Qwest") respectfully submits these comments in response to the comments filed by Level 3 Communications, LLC regarding the First Circuit's decision in *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1<sup>st</sup> Cir. 2006) ("Global NAPS").

### COMMENTS

At issue in this proceeding is the scope of the FCC's *ISP Remand Order*.<sup>1</sup> The two most authoritative decisions on that question are *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("WorldCom") and *Global NAPS*. In these cases, the D. C. Circuit and First Circuit each interpreted the *ISP Remand Order* to prescribe compensation *only* for calls placed to an Internet Service Provider ("ISP") located in the same local calling area as the calling party.<sup>2</sup> The First

<sup>1</sup> Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("ISP Remand Order").

<sup>2</sup> The *Global NAPS* decision and the FCC's Amicus Brief are completely consistent with the

1 Circuit based its decision, among other things, upon comments filed by the FCC in which the  
2 FCC stated that it “has not addressed application of the *ISP Remand Order* to ISP-bound calls  
3 outside a local calling area.”<sup>3</sup> Thus, no matter how loosely the *ISP Remand Order* is written,  
4 there can be no dispute as to the scope of the *ISP Remand Order*. The FCC’s own words belie  
5 any notion that the *ISP Remand Order* compensation scheme encompasses calls to ISPs outside  
6 the local calling area of the calling party.

7 Pac-West bases its claim in this proceeding on an amendment whose sole purpose was to  
8 implement the *ISP Remand Order*. As the arbitrator in the 2004 arbitration between Qwest and  
9 Pac-West stated, “the parties’ intent was to do *no more and no less* that what the FCC provided  
10 for in the *ISP Remand Order*.”<sup>4</sup> (Emphasis added). Thus, the sole issue before the Commission  
11 is the legal effect of the *ISP Remand Order* – that is, did it establish compensation solely for  
12 calls to ISPs located in the same local calling area, or was it intended to apply more broadly so as  
13 to displace applicable intrastate and interstate access charges? The *WorldCom* Court, the *Global*  
14 *NAPs* Court, and the FCC itself have all answered that question by stating that the *ISP Remand*  
15 *Order* only prescribes compensation for calls placed to an ISP located in the same local calling  
16 area as the calling party.

17 Level 3 filed comments in which it argues that the Commission is not bound to follow  
18 *Global NAPs* and that the Commission is free under its state law authority to retroactively and  
19 without a fair value determination extend the *ISP Remand Order’s* compensation scheme to  
20

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21 *WorldCom* court’s statement of the holding of the *ISP Remand Order*:: “In the order before us  
22 the [FCC] held that under § 251(g) of the Act it was authorized to ‘carve out’ from § 251(b)(5)  
23 calls made to internet service providers (“ISPs”) *located within the caller’s local calling area*.”<sup>2</sup>  
24 288 F.3d at 430 (emphasis added). This plain, unequivocal language is the reviewing court’s  
25 express statement that the *holding* of the *ISP Remand Order* relates *solely* to local ISP traffic.  
26 The FCC’s Amicus Brief was filed in the *Global NAPs* case at the request of the First Circuit. It  
is attached as Exhibit A to Qwest’s exceptions.

<sup>3</sup> Amicus Brief, at 10.

<sup>4</sup> The 2004 Arbitration between the parties is referenced in paragraph 8 of the ROO and the  
Ruling is attached to Pac-West’s Complaint as Exhibit C.

1 encompass long distance calls placed to ISPs (including specifically VNXX calls to ISPs). Level  
2 3's comments are completely erroneous and should be rejected.

3 **I. In the *ISP Remand Order*, the FCC Only Set Compensation for Calls to ISPs**  
4 **Located in the Same Local Calling Area as the Calling Party**

5 In its comments, Level 3 makes the following statement concerning the Commission's  
6 task in this case:

7 When the parties to an interconnection contract do not agree on how the contract  
8 should be interpreted, it is the job of the state commission to decide. If the  
9 contract – or an FCC ruling referred to in the contract, is not totally clear, then the  
commission's job is to exercise its best judgment as to what the contract – or the  
FCC ruling—means. (Level 3 Comments, p. 5).

10 Even if (for purposes of argument) one accepts the foregoing language as the proper criteria,  
11 there is still only one lawful outcome in this case and that is to rule in Qwest's favor. That is  
12 because the FCC stated in its comments to the First Circuit in *Global NAPs* that in its *ISP*  
13 *Remand Order* it was only setting compensation terms for calls to ISPs located in the same local  
14 calling area as the calling party:

15 The Commission itself has not addressed application of the *ISP Remand Order* to  
16 ISP-bound calls outside a local calling area. Nor has the Commission decided the  
17 implications of using VNXX numbers for intercarrier compensation more  
generally. (Amicus Brief, at 10-11).

18 The administrative history that led up to the *ISP Remand Order* indicates that in  
19 addressing compensation, the Commission was focused on calls between dial-up  
users and ISPs in a single local calling area...

20 The administrative history does not indicate that the Commission's focus  
broadened on remand. (*Id* at 12-13).

21 *WorldCom* could not have been more clear on that issue. But, to the extent *WorldCom* might  
22 erroneously be perceived as less than definitive on the scope of the *ISP Remand Order*, the  
23 FCC's comments in its Amicus Brief remove any ambiguity as to what the FCC actually did in  
24 the *ISP Remand Order*. The FCC was not addressing calls to an ISP outside of the local calling  
25 area of the calling party and therefore, as a matter of law, it cannot have set compensation terms  
26

1 for such traffic. That is the holding of *WorldCom*, which was confirmed in great detail in *Global*  
2 *NAPs* and it is the only lawful conclusion one can reach as a result of the FCC's comments. A  
3 state commission's role in resolving a dispute under an interconnection agreement is based on a  
4 delegation of federal authority under the Act.<sup>5</sup> In fulfilling that role, the state commission must  
5 follow federal law. In this case, two circuit court decisions and the FCC's own statements of its  
6 intent make it clear beyond doubt that the compensation regime of the *ISP Remand Order* is  
7 limited to traffic where the calling party and the ISP are located within the same local calling  
8 area. There simply is no other reasonable interpretation of federal law and the state commission  
9 is not free to craft its own conclusion in the face of governing federal law.<sup>6</sup>

10 Level 3's next statement leads even more conclusively to a determination in Qwest's  
11 favor:

12 So, the question here is not, "Has the FCC so clearly, expressly and unequivocally  
13 said that the *ISP Remand Order* applies to literally all ISP-bound traffic that states  
14 are completely preempted from dealing with the issue?" Instead, the question is  
15 much more sensible: "What is the best and most logical way to interpret the *ISP*  
*Remand Order*, in light of the FCC's overall analysis and what it was trying to  
accomplish?"

16 By this standard, the *ISP Remand Order* cannot be applied broadly as Level 3 proposes. That is  
17 because the purpose of the *ISP Remand Order* was *emphatically not* to expand the flow of  
18 compensation from ILECs to CLECs for terminating ISP traffic. The FCC's expressed intention  
19 in the *ISP Remand Order* was to reduce, and eventually eliminate, payment of terminating

---

20 <sup>5</sup> *Southwestern Bell Tel. Co. v. Brooks Fiber Comm. of Oklahoma*, 235 F.3d 493, 497 (10th Cir.  
21 2000) (citation omitted) ("When a state commission, after approving an agreement pursuant to  
22 the authority granted by the Act, subsequently issues another decision interpreting the terms of  
the agreement, this is also a "determination" pursuant to its authority under § 252.).

23 <sup>6</sup> *Global NAPs* relied directly on the language from *WorldCom* that stated that the *ISP Remand*  
24 *Order* applies only to local ISP traffic. (444 F.3d at 74). Qwest has previously briefed the impact  
25 of the Hobbs Act on this case (see footnote 8 to Qwest's Supplemental Brief in this matter),  
26 which mandates that federal courts of appeal have the exclusive jurisdiction to interpret FCC  
orders. Two federal circuit court decisions, first *WorldCom*, and now *Global NAPs*, have ruled  
that the *ISP Remand Order* applies only to local ISP traffic. There is no ambiguity whatever on  
that issue.

1 compensation on ISP traffic. As the FCC stated in the *ISP Remand Order*:

2 In sum, our goal in this order is decreased reliance by carriers upon carrier-to-  
3 carrier payments and an increased reliance upon recovery of costs from end-users,  
4 consistent with the tentative conclusion in the NPRM that bill and keep is the  
appropriate intercarrier compensation mechanism for ISP-bound traffic. (*ISP  
Remand Order* ¶ 7).

5  
6 We believe that a bill and keep regime for ISP-bound traffic may eliminate these  
[uneconomic] incentives and concomitant opportunity for regulatory arbitrage by  
7 forcing carriers to look only to their ISP customers, rather than to other carriers,  
for cost recovery. As a result, the rates paid by ISPs and, consequently, their  
8 customers should better reflect the costs of service to which they subscribe.  
Potential subscribers should receive more accurate price signals, and the market  
9 should reward efficient providers. (*Id.* ¶ 74).

10  
11 We are convinced ... that intercarrier payments for ISP-bound traffic have created  
12 severe market distortions. (*Id.* ¶ 76)

13 Thus, if public policy as articulated by the FCC is to be the guide, the conclusion the  
14 Commission must reach is that the *ISP Remand Order* should be applied restrictively, not  
15 broadly as Level 3 proposes.<sup>7</sup>

16 The FCC's policy pronouncement in the *ISP Remand Order* is sound and simple. The  
17 dial-up ISP is the party who should pay the costs incurred to provide dial-up service. It is not a

18  
19 <sup>7</sup> It is also worth noting that Pac-West has acknowledged, in response to data requests in a  
20 similar docket in Washington that if a Qwest customer makes a 1+ call to an ISP served by Pac-  
21 West "then the appropriate compensation mechanism would be terminating access charges paid  
22 to Pac-West by the long distance carrier, and originating access charges paid to Qwest by the  
23 long distance carrier unless Qwest is acting as the long distance carrier." Pac-West Response to  
24 Data Request No. 20, July 15, 2005, Docket No. UT-053036. Pac-West's response to Data  
25 Request No. 22 is to the same effect. These responses demonstrate the speciousness of the  
26 advocates of VNXX traffic. By disguising interexchange calls through the use of local telephone  
numbers, Pac-West purports to be able to turn a long distance call (where access charges would  
apply) into a local call, where Qwest would not be compensated for the use of its network and  
would also owe Pac-West terminating compensation. Yet, other than Pac-West's ability to  
disguise the call, they are identical. The unfairness of this simple sleight-of-hand trick is  
obvious—it is an exaltation of form over substance. Copies of the two Pac-West Washington  
data responses are attached hereto as Exhibit A.

1 cost that should be attributed to Qwest and recovered from Qwest customers who have not  
2 subscribed to dial-up service offered by Pac-West's ISP customers. As the FCC stated: "There is  
3 no public policy rationale to support a subsidy running from all users of basic telephone service  
4 to those end users who employ dial-up Internet access." (*Id.* ¶ 87).

5 In its comments, Level 3 is asking the Commission to reverse the course the FCC has set.  
6 Instead of recovering costs from ISP customers, Level 3 is advocating that it and Pac-West  
7 recover those costs from Qwest. It does this by arguing for an expansion of the compensation  
8 regime the FCC created in the *ISP Remand Order* to encompass long distance calls placed to  
9 ISPs that were never addressed in the *ISP Remand Order*. Level 3's position is inconsistent with  
10 governing federal law and is bad public policy.

11  
12 **II. Arizona Law Requires a Fair Value Determination Before Rates May Be Changed**  
13 **and Any Rate Change May Operate Only Prospectively**  
14

15 In the *ISP Remand Order*, the FCC did not set intercarrier compensation rates for calls  
16 placed to ISPs outside the local calling area of the calling party. That is crystal clear from the  
17 comments the FCC filed with the First Circuit in *Global NAPs*: As the First Circuit stated:

18 The FCC further notes that "in establishing the new compensation scheme for  
19 ISP-bound calls, the Commission was considering only calls placed to ISPs  
20 located in the same local calling area as the caller." According to the FCC, "[t]he  
21 Commission itself has not addressed application of the *ISP Remand Order* to ISP-  
22 bound calls outside the local calling area" or "decided the implications of using  
VNXX numbers for intercarrier compensation more generally." (444 F.3d at 74,  
quoting *Amicus Brief* at 10, 11).

23 As a result, any action by the Commission to set intercarrier compensation rates for non-local  
24 calls placed to ISPs would have to be based on the Commission's state law authority. The  
25 character of the Commission's action does not change merely by redefining the Commission's  
26 action to be interpretation of the *ISP Remand Order*. That is because there is nothing to

1 interpret. The FCC itself has said that it was only setting intercarrier compensation for local ISP  
2 traffic.

3 In this case, the service that Pac-West offers is in substance a 1-800 service that allows  
4 dial-up ISP customers to place toll-free calls to ISPs served by Pac-West.<sup>8</sup> Under the existing  
5 access charge rules, Qwest and other local exchange carriers are entitled to charge Pac-West  
6 originating access for these long distance calls placed by dial-up subscribers.

7 According to Level 3, the Commission should exercise its state law authority to set Pac-  
8 West's rate for terminating non-local ISP traffic equal to the rate prescribed in the *ISP Remand*  
9 *Order* for terminating local ISP traffic. Level 3 argues that this would lead to a uniform rate  
10 structure for ISP traffic that would replace the rates applicable under the existing access charge  
11 rules. Thus, Level 3 requests that the rates Qwest is entitled to charge Pac-West for originating  
12 long distance ISP traffic be eliminated and that a termination rate that Pac-West could charge be  
13 created.

14 Level 3's proposal that the Commission make these changes in rate structure under the  
15 auspices of interpreting the *ISP Remand Order* is unlawful. Article XV, §§ 3 and 14 of the  
16 Arizona Constitution require the Commission to make a fair value determination of the property  
17 of any public service corporation in conjunction with setting rates. These provisions prohibit the  
18 Commission from either increasing or decreasing a public service corporation's rates on a  
19 piecemeal basis without first conducting a fair value determination and then setting rates that

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20 <sup>8</sup> Two commissions have compared VNXX to in-bound 800 service in recent orders. Order  
21 Ruling on Arbitration, *In re Petition of MCI Metro Transmission Services, LLC for Arbitration of*  
22 *Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative*, 2006  
23 S.C. PUC LEXIS 2, at \*35 (S.C. PUC, January 11, 2006) (VNXX calls "are no different from  
24 standard dialed long distance toll or 1-800 calls."); *Petition of Global NAPs, Inc. for Arbitration*  
25 *Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection*  
26 *Agreement with Verizon New England*, Docket No. 6742, 2002 Vt. PUC LEXIS 272, at \*41-\*42  
(Vt. PSB 2002)("In effect, a CLEC using VNXX offers the equivalent of incoming 1-800  
service, without having to pay any of the costs associated with deploying that service and instead  
relying upon [the ILEC] to transport the traffic without charge simply because the VNXX says  
the call is 'local.'").

1 allow a reasonable return on that rate base. *Scates v. Arizona Corp. Comm'n*, 118 Ariz. 531,  
2 534, 537, 578 P.2d 612, 615, 618 (Ct. App. 1978); *Simms v. Round Valley Light & Power Co.*,  
3 80 Ariz. 145, 294 P.2d 378 (1956). This requirement was recently reaffirmed and clarified by  
4 the Arizona Supreme Court in *US West Communications, Inc. v. Arizona Corporation Comm'n*,  
5 201 Ariz. 242, 246, 34 P.3d 351, 355 (2001).

### 6 7 **III. The Ninth Circuit's *Pac-Bell* Decision Does Not Support Level 3's Position**

8  
9 In its comments, Level 3 attempts to argue that the Ninth Circuit's decision in *Pacific*  
10 *Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9<sup>th</sup> Cir. 2003) ("*Pac-Bell*"), somehow supports  
11 its position. However, *Pac-Bell* was not a dispute about the scope of the *ISP Remand Order*. It  
12 was a dispute about the authority of the California Public Utility Commission ("CPUC") to issue  
13 generic rules implementing the Act. The Ninth Circuit held that "the CPUC lacks authority  
14 under the Act to promulgate general "generic" regulations over ISP traffic." (*Id.* at 1125).

15 Moreover, *Global NAPs* and *Pac-Bell* are not at odds, as Level 3 argues. According to  
16 Level 3, what puts them at odds is *Pac-Bell*'s statement that the *ISP Remand Order* "abandoned  
17 the distinction between local and interstate traffic as the basis for determining whether reciprocal  
18 compensation provisions in interconnection agreements apply to ISP-bound traffic." (*Id.* at  
19 1130). However, this is a statement concerning the applicability of reciprocal compensation, not  
20 a statement about the applicability of access charges to non-local ISP traffic. In the *ISP Remand*  
21 *Order*, the FCC expressly recognized that ISPs are treated as end users for the purposes of  
22 applying access charges and the FCC made no change to that well-established rule. (*ISP*  
23 *Remand Order* ¶11; *Global NAPs*, 444 F.3d at 42-43). As the D. C. Circuit stated in *ACS of*  
24 *Anchorage v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002), the FCC has "defined them as 'end  
25 users' – no different from a local pizzeria or barber shop."



1       Toward the end of its comments, Level 3 argues that *Global NAPs* at most transforms the  
2 dispute concerning the scope of the *ISP Remand Order* from a "legal" matter to a policy matter.

3 According to Level 3:

4       The key question before the Commission on this topic is, then, how to craft a fair  
5 policy on compensation for ISP-bound calls without imposing unreasonable cost  
6 burdens for handling such traffic on competitors and/or end users. (Level 3  
Comments, p. 9).

7 Posing the issue this way completely undercuts Level 3's position. First, if application of the *ISP*  
8 *Remand Order* compensation scheme to non-local ISP-traffic is actually a policy dispute, then  
9 the Commission cannot adopt the ROO. As stated above, the Commission must first conduct a  
10 hearing to evaluate the facts about the cost burdens and fairness to competitors and make the fair  
11 value determinations the Arizona Constitution requires.

12       Furthermore, Level 3's proposal to expand the reach of the *ISP Remand Order* is  
13 manifestly unfair to Qwest and to end users generally. Qwest recovers its costs of originating  
14 long distance calls placed to ISPs through originating access charges. If the Commission decides  
15 that originating access charges should not be assessed on long distance calls to ISPs, as Level 3  
16 argues, then Qwest would be deprived recovery of the cost it incurs to originate these calls.  
17 Under such circumstances, it is completely inappropriate to then require Qwest to pay Pac-West  
18 or Level 3 for termination of these calls. Stated another way, if cost recovery on the originating  
19 end is denied, cost recovery on the terminating end should be denied as well.

20       Level 3 is not a party to this case, yet its comments are filled with factual assertions.  
21 Qwest disagrees with most of Level 3's assertions. However, this is not the time to resolve  
22 factual differences between Qwest and a non-party; it must be kept in mind that the ROO is  
23 before the Commission on a summary determination made without a hearing on the merits.  
24 Thus, even if it were a party, before any of Level 3's factual assertions could be considered, there  
25 must be an evidentiary hearing.


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**CONCLUSION**

On the basis for the foregoing, Qwest respectfully requests that the Commission reject the comments filed by Level 3 Communications, LLC, regarding the *Global NAPs* decision as well as the ROO.

RESPECTFULLY SUBMITTED this 16th day of June, 2006.

QWEST CORPORATION

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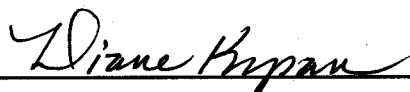
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# **EXHIBIT A**

**WUTC Docket No. UT-053036**  
**Pac-West Responses to Qwest Data Requests**  
**July 15, 2005**

**Data Request No. 20:**

If a Qwest customer were to place a 1+ call to an ISP served by Pac-West, what intercarrier compensation mechanism should apply, in Pac-West's view?

**Response:**

Assuming Qwest properly routed the call to the customer's pre-subscribed long distance carrier (which may be Qwest), then the appropriate compensation mechanism would be terminating access charges paid to Pac-West by the long distance carrier, and originating access charges paid to Qwest by the long distance carrier unless Qwest is acting as the long distance carrier.

Prepared by: Ethan Sprague  
Telephone: 209-926-3416  
Date: July 15, 2005

WUTC Docket No. UT-053036  
Pac-West Responses to Qwest Data Requests  
July 15, 2005

**Data Request No. 22:**

If a Qwest customer in Washington were to place a 1+ call to an ISP in Chicago, with a Chicago phone number, is it Pac-West's position that toll and access charges should apply to that call, or that Qwest should pay compensation to the terminating carrier?

**Response:**

Assuming Qwest properly routed the call to the customer's pre-subscribed long distance carrier (which may be Qwest), then the proper compensation mechanism would be terminating access charges paid to the ISP's local exchange carrier by the long distance carrier, and originating access charges paid to Qwest by the long distance carrier unless Qwest is acting as the long distance carrier.

Prepared by: Ethan Sprague  
Telephone: 209-926-3416  
Date: July 15, 2005